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NO. 91-823

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1991 Term

HENRY HOLLEY,

Petitioner

versus

RONALD SCHREIBECK and
CITY OF ALLENTOWN,

Respondents

PETITION FOR WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, WHERE PETITIONER ALLEGED NOTHING MORE THAN ON A SINGLE OCCASION A POLICE OFFICER TOLD SEVERAL WHITE FEMALES TO STAY AWAY FROM PETITIONER, A BLACK MALE, BECAUSE HE WAS A PIMP.

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COUNTERSTATEMENT OF THE CASE

Petitioner, Henry Holley, filed a complaint in the United States District Court for the Eastern District of Pennsylvania on or about December 20, 1990. The complaint alleged that Respondents, Ronald Schreiber and the City of Allentown, violated Petitioner's rights to free association under the First Amendment to the United States Constitution. In addition, the complaint alleged pendent state law claims for defamation. The district court's jurisdiction was alleged to have derived from 42 U.S.C. §§1981 and 1983.

On or about January 8, 1991, Respondents filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) based upon the failure of the

complaint to state a claim upon which relief could be granted.

On January 18, 1991, in lieu of filing a brief and in response to Respondents' Rule 12(b)(6) motion, Petitioner filed an amended complaint. The amended complaint eliminated Petitioner's claim under 42 U.S.C. §1981 and added an allegation that his constitutional right to equal protection of the laws had been violated. Although Rule 20(c) of the Local Rules of the United States District Court for the Eastern District of Pennsylvania expressly required Petitioners to file and serve a brief in opposition to Respondents' Rule 12(b)(6) motion, Petitioner failed to do so.

The district court, on January 25, 1991, entered an order granting

Respondents' motion to dismiss and dismissing Petitioner's amended complaint without leave to amend, holding that the amended complaint failed to state a federal cause of action. The district court noted Petitioner's failure to file a brief in violation of Local Rule 20(c) and deemed the motion to dismiss as being uncontested. A copy of the district court's order is attached hereto as Appendix A.

In response to the district court's January 25, 1991 order dismissing the amended complaint, Petitioner filed a motion for reconsideration. On March 4, 1991, the district court entered an opinion and order which denied Petitioner's motion for reconsideration and assessed counsel fees and costs expended by Respondents in responding to

the motion for reconsideration.

Thereafter, the Petitioner filed an appeal with the United States Court of Appeals for the Third Circuit from the district court's orders dismissing the amended complaint and assessing counsel fees and costs. The Third Circuit, in a one-sentence judgment order, affirmed the district court's judgments.

In both his complaint and amended complaint, Petitioner alleged that on December 30, 1989, Respondent, Ronald Schreiber, while on duty as a police officer for Respondent, City of Allentown, approached several of Petitioner's white, female friends and reported to them to stay away from Petitioner because Petitioner was a pimp and/or involved with prostitution activities. Petitioner, a black male, further alleged that he has

never been convicted of any offense relating to prostitution or pimping and denied that he was ever a pimp or involved in any prostitution activities. The amended complaint alleged that Officer Schreiber's remark to Petitioner's white female friends was prompted by a desire to enforce the laws in a manner which discriminated against blacks. Moreover, Petitioner alleged that the City of Allentown knew of Officer Schreiber's "racist propensities" and acquiesced in his conduct. The amended complaint is devoid of any allegations that any investigations of Petitioner or his friends were conducted, that any arrests were made, or that any other actions were taken against them. Rather, Petitioner's entire cause of action is based upon a

single, allegedly defamatory remark made by the defendant police officer.

Petitioner filed the present petition for a writ of certiorari based upon the equal protection clause of the Fourteenth Amendment to the United States Constitution alleging that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter.

Respondents submit this brief in opposition to the petition for a writ of certiorari pursuant to Rule 15 of the Rules of this Honorable Court.

SUMMARY OF ARGUMENT

In his petition for writ of certiorari, Petitioner contends that the Third Circuit Court of Appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter so "as to call for an exercise of this Honorable Court's power of supervision" under Rule 17(1)(a) (sic) of the Rules of this Honorable Court. While it is true that Rule 10.1(a) describes such a conflict as a reason for this Honorable Court's exercise of discretionary review, the federal circuit court decisions relied upon by Petitioner have no application to Petitioner's case. Accordingly, no such conflict between the federal courts of appeals exists.

Notwithstanding the bald assertions of his amended complaint, Petitioner failed to make any objective factual allegations from which Respondent Ronald Schreibeck's "racial animus" can be inferred. At best, Petitioner's amended complaint alleges nothing more than a cause of action for defamation under state law, which is not within the ambit of civil rights protected by the United States Constitution.

The Fourteenth Amendment prohibits the denial of equal protection of the laws, but Petitioner's equal protection rights were not implicated in this case because Officer Schreibeck's alleged remark, standing alone, did not constitute law enforcement. No investigations or arrests of Petitioner or his friends were made, and, consequently, Petitioner's

amended complaint failed to allege that Officer Schreiber was enforcing any law when the alleged remark was made.

ARGUMENT

I. NO CONFLICT EXISTS BETWEEN THE
DECISION OF THE THIRD CIRCUIT IN THIS
CASE AND A DECISION OF ANY OTHER
FEDERAL COURT OF APPEALS SO AS TO
JUSTIFY THE EXERCISE OF DISCRETIONARY
REVIEW UNDER RULE 10.1(a) OF THE
RULES OF THIS HONORABLE COURT.

In his petition for a writ of certiorari, Petitioner states the following as his reason for allowance of the writ:

Review by certiorari is appropriate in the case at bar under Rule 17(1)(a) (sic) of the Rules of the United States Supreme Court in that a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision.

A review of the Third Circuit's decision in the case at bar demonstrates that it is not in conflict with the federal appellate decisions cited in the Petition. Indeed, the decision is well-supported by judicial precedent.

The first step in determining whether a conflict exists is to analyze what the Third Circuit decided in this case. Petitioner filed an appeal from the March 1, 1991 order of the United States District Court for the Eastern District of Pennsylvania, which denied Petitioner's motion for reconsideration of the dismissal of Petitioner's amended complaint under Fed.R.Civ.P. 12(b)(6). The district court's March 1, 1991 order also assessed counsel fees and costs expended by Respondents in responding to Petitioner's motion for reconsideration.

In its opinion, the district court initially discussed Petitioner's failure to file a brief in opposition to Respondents' Rule 12(b)(6) motion, as was required by the district court's Local Rule 20(c). Petitioner's only response to the motion to dismiss was an amended complaint. As the district court noted in its opinion:

We do not dispute that the amended complaint qualified under this local rule as a "response". Our difficulty was and it is with the unexplained failure of Plaintiff's counsel to file a brief along with the response. A brief would have been particularly helpful in responding to defendants' arguments, because, although plaintiff chose to change the legal characterization of the action in an amended complaint, the underlying facts remained basically the same.

This is not the first case in which this court has had this kind of difficulty with this particular plaintiff's counsel. Plaintiff's counsel is obliged

to abide by the court's Local Rules of Civil Procedure, not by the rules as he envisions them.

The district court then directed Petitioner's counsel to pay Respondents' counsel fees and costs expended in replying to Petitioner's motion for reconsideration. Although in his Statement of Case Petitioner states that he appeals (sic) the dismissal of his amended complaint and the imposition of sanctions against Petitioner's counsel, Petitioner offers no legal authority that would conflict with the district court's decision in this regard.

On appeal, the question is whether the district court abused its discretion in assessing counsel fees and costs against Petitioner's counsel. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir. 1986); Larouche v. National

Broadcasting Co., 780 F.2d 1134 (4th Cir. 1986). Without opinion, the Third Circuit affirmed the district court's order. Considering Petitioner's failure to cite any legal precedent which conflicts with the Third Circuit's decision to affirm the assessment of sanctions, certiorari should not be granted on that issue.

The second portion of the district court's opinion sets forth the reasons for its conclusion that Petitioner's amended complaint failed to state a cause of action under 42 U.S.C. §1983. Although the district court discussed the issue of freedom of association under the First Amendment to the United States Constitution in some detail, the Court also found that the amended complaint did not allege a violation of Petitioner's right to equal protection of law. Again,

without opinion, the Third Circuit affirmed the district court's dismissal of the amended complaint. Because the petition before this Honorable Court raises only the issue of equal protection, the decisions of the courts below relating to freedom of association will not be discussed.

The second step in determining whether a conflict between federal courts of appeals exists is to analyze the pertinent decisional law. Petitioner cites several cases which purport to advance his contention that his amended complaint stated a viable equal protection claim. Scrutiny of these cases, however, shows them to be inapposite.

In Bethel v. Jendoco Construction Corp., 570 F.2d 1168 (3rd Cir. 1978), a black carpenter commenced a civil rights

action against various companies engaged in the construction business and certain unions which represented construction workers. Plaintiff filed an equal protection claim under §§1981, 1983, 1985, 1986 and 2000(e) et seq. of Title VII of the Civil Rights Act of 1964. The court of appeals reversed the trial court's dismissal of plaintiff's claims under §§1981, 1985, 1986 and 2000(e) et seq. of Title VII, but affirmed the dismissal of plaintiff's §1983 claim. Unlike the case at bar, Bethel arose in the employment context and involved discrimination claims such as not being hired for jobs when whites were hired, being laid off before whites, being called back to work after whites, being assigned to undesirable duties, and being passed over for overtime work and for promotions. In the instant

case, Petitioner makes no allegations remotely similar to those in Bethel. In addition, the legal theories in Bethel are entirely different than those in the present case. Petitioner's case involves a §1983 claim whereas in Bethel the court of appeals dismissed the §1983 claims because the defendant's actions did not arise "under color of state law". The holding in Bethel, therefore, provides no support for Petitioner's assertion that he has a viable cause of action under §1983.

Petitioner also cites this Honorable Court's decision in Gomez v. Toledo, 446 U.S. 635, 64 L.Ed.2d 572, 100 S. Ct. 1920 (1980), although his basis for doing so is unclear. The holding in Gomez was that in order to plead a viable course of action against a public official under §1983, a plaintiff was not required to allege bad

faith on the part of the public official. No such issue exists in the present case. Thus, the decision in Gomez is entirely inapposite.

Apart from Bethel, the only other appellate decision cited by Petitioner is Phelps v. Wichita Eagle-Beacon, 886 F.2d 1262 (10th Cir. 1989), incorrectly cited in the petition as a case from the Third Circuit. The Tenth Circuit's decision in Phelps provides little support for Petitioner's position. In that case, plaintiff, a white attorney, brought suit against a newspaper, its employees and the former Attorney General of the State of Kansas alleging that the defendants conspired to publish defamatory articles about him in violation of federal civil rights statutes, the First and Fourteenth Amendments, and the Racketeer Influenced

and Corrupt Organizations Act (RICO). The newspaper had published two articles about plaintiff. The first article summarized and quoted an investigative report about plaintiff prepared by the Kansas attorney general's office. The report discussed how plaintiff had brought numerous lawsuits soon after alleged incidents and settled them for a fraction of the amount sought. Critics of plaintiff were quoted in the article as stating that he brought "strike suits" for "nuisance value". The second article discussed plaintiff's background and education, his representation of the poor and minorities in Kansas, and his disbarment from Kansas courts in 1979. This article stated that many people saw him as a crusader for the rights of the poor and minorities. The article observed that plaintiff "sees

himself as the ideological heir of a long line of Baptist preacher-lawyers who used the Bible as a source of inspiration".

Although the Tenth Circuit reversed the district court's dismissal of plaintiff's §1983 claim based on equal protection, some of the statements in one of the articles provided a reasonable basis for inferring a race-based animus. In particular, plaintiff was described as a "black man's lawyer", a "modern-day John Brown" and a "savior to blacks in Kansas". These statements, coupled with the general allegations of race-based animus, convinced the Tenth Circuit that plaintiff had stated a claim under the equal protection clause of the Fourteenth Amendment sufficient to overcome a motion to dismiss.

In sharp contrast to the situation in Phelps, Petitioner cannot point to any action or statement from which a race-based animus can be inferred. In the instant case, Petitioner's entire equal protection argument rests on the fact that he is black and that a white police officer expressed his opinion about Petitioner's activities. Other than Petitioner's unsupported assertion that racial animus prompted Officer Schreibeck's remark, the amended complaint contained no objective factual allegations from which racial animus can be inferred.

Petitioner in his amended complaint has alleged nothing more than a cause of action for defamation under state law. As such, his claim is not within the ambit of civil rights protected under the United States Constitution, and so the lower

courts in this matter correctly held. Ellingburg v. A. G. Lucas, 518 F.2d 1196 (8th Cir. 1975); Collins v. Cundy, 603 F.2d 825 (10th Cir. 1979); Johnson v. Hackett, 284 F. Supp. 933 (E.D. Pa. 1968). Section 1983 should not be used to "federalize" what is clearly a state tort law claim.

Petitioner has not demonstrated that the Third Circuit's decision to affirm the district court's dismissal of his amended complaint is in conflict with a decision of another federal court of appeals on the same matter. The Bethel and Phelps decisions, supra, are easily distinguished. Accordingly, because no conflict between the federal circuit courts exists, this Honorable Court should not exercise its discretionary review.

CONCLUSION

For the reasons set forth above, this Honorable Court should deny Petitioner Henry Holley's petition for writ of certiorari.

Respectfully submitted,

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On the Brief

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HENRY HOLLEY,	:	CIVIL ACTION
Plaintiff,	:	
	:	No. 90-8012
vs.	:	
	:	
RONALD SCHREIBECK, and	:	
CITY OF ALLENTOWN,	:	
Defendants	:	JURY TRIAL DEMANDED

ORDER

AND NOW, this 25th day of January,
1991, upon consideration of Defendants'
motion to dismiss, IT IS ORDERED that
Defendants' motion to dismiss is hereby
GRANTED and that Plaintiff's amended
complaint is dismissed without leave to
amend. 1

BY THE COURT:

Franklin S. VanAntwerpen, J.

1. NO TIMELY RESPONSE HAS BEEN FILED AND

THE COURT DEEMS THIS MOTION TO BE UNOPPOSED AND UNCONTESTED UNDER LOCAL R.CIV.P. 20(c). NO BRIEF HAS BEEN FILED AS EXPRESSLY REQUIRED. IN ADDITION THE AMENDED COMPLAINT DOES NOT MAKE OUT A FEDERAL CAUSE OF ACTION.

FILED JAN 28 1991